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ALEXANDER L. STEVAS,
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No. 82-166

In the Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
MONTGOMERY WARD & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of International Trade lacked jurisdiction over petitioner's challenge to settlement agreements by which the Secretary of Commerce, the Secretary of the Treasury, and the Attorney General, acting pursuant to 19 U.S.C. 1617, compromised claims against 22 importers with respect to dumping duties and civil penalty claims arising out of the importation of Japanese-manufactured television sets prior to April 1, 1979.

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OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 1a-20a) is reported at 673 F. 2d 1254. An amendment to that opinion dated May 13, 1982 (Pet. App. 29a-30a) is not yet reported. The May 13, 1981, order of the Court of International Trade (Pet. App. 21a-26a) is reported at 15 Cust. Bull. & Dec. No. 23,106; the February 27, 1981, order of the same court (Pet. App. 99a-109a) is not reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 11, 1982. A petition for rehearing was denied on May 13, 1982 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

STATEMENT

1. Petitioner, a domestic manufacturer of television sets, challenges the validity of settlement agreements entered into between 22 importers of television sets and the United States Departments of Commerce, Treasury, and Justice involving dumping-duty claims for television sets imported from Japan between July 1, 1973, and March 31, 1979.[1]

In 1971, the Treasury Department found that certain Japanese television sets were being "dumped" in the United States; *i.e.*, the sets were being sold here for less than their market value in Japan. T.D. 71-76, 36 Fed. Reg. 4597 (1971). Pursuant to the Antidumping Act of 1921,[2] then in force, the Customs Service was therefore required to determine the United States purchase price (or exporter's sales price) of each importation (entry) of television receivers covered by the dumping finding and to compare this price to the "foreign market value" (the wholesale price in the Japanese market) of comparable receivers. If the purchase price of any entry was less than its "foreign market value," adjusted for differences in circumstances of sale,[3] the

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[1]The factual background of this case is detailed in the affidavits of Robert H. Mundheim, General Counsel, Department of the Treasury ("Mundheim Aff."), and Robert E. Chasen, Commissioner of Customs ("Chasen Aff."), and the declaration of Homer E. Moyer, Jr., General Counsel, Department of Commerce ("Moyer Decl."), which were attached to the government's Motion to Dismiss filed in the Court of International Trade.

[2]19 U.S.C. 160 *et seq.* (1976) (current version codified at 19 U.S.C. (Supp. IV) 1673 *et seq.*).

[3]Pursuant to the Antidumping Act of 1921, the Secretary of the Treasury was empowered to adjust the foreign market value of imported goods when he found that differences in the wholesale quantities in which the imported goods were sold in their principal market, or other factors, impacted upon the disparity between the United States purchase price and the foreign market value.

Customs Service was required to assess an additional duty upon the entry equal to this difference or "margin."

The Customs Service encountered substantial difficulty in determining the margins on the television imports subject to the dumping finding (see Mundheim Aff. para. 7). Part of this difficulty resulted from the sheer magnitude of the task, compounded by the fact that Japanese manufacturers were reluctant to submit timely information upon which "foreign market value" could be determined (Chasen Aff. paras. 25-28). In addition, some of the information submitted was subject to grave doubt as to its reliability (*id.* at paras. 29-32). As a result, very few entries were liquidated[4] between 1971 and 1978 (Chasen Aff. paras. 19, 24). Limited liquidations occurred only in 1972, 1973 and 1976 (*ibid.*).

Due to the inability of the Customs Service to liquidate entries on a current basis, a large backlog of entries accumulated. In order to eliminate this backlog, the Commissioner of Customs proposed to the General Counsel of the Treasury, who then possessed authority to direct the administration of the antidumping law, that "foreign market value" be determined upon the basis of the Japanese Commodity Tax, rather than upon the basis of information submitted by the Japanese manufacturers (Mundheim Aff. para. 6).[5] The Japanese Commodity Tax is based on a percentage of the factory wholesale price and is imposed upon all television receivers sold in Japan (see Chasen Aff. paras. 33, 34). The Commissioner concluded that the factory wholesale price, as it is computed in determining the Japanese Commodity Tax, could be used to set the "foreign market value"

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[4]"Liquidation" is the final computation of duties accruing on an entry of goods into the United States. See 19 C.F.R. 159.1.

[5]Authority for adopting this new method of computing the foreign market value was premised on 19 U.S.C. 168 (1976) (currently codified at 19 U.S.C. (Supp. IV) 1673h) and 19 U.S.C. (Supp. IV) 1500(a).

of the imported television sets because that price so closely approximated the foreign market value of sets sold in Japan (*id.* at para. 34).[6] The Commissioner also proposed to utilize invoice prices to determine the purchase price or exporter's sales price.[7]

The General Counsel of the Treasury and the Commissioner of Customs thereafter agreed upon the following course of action: (1) on March 31, 1978, all entries through July 1973 would be liquidated utilizing the approach recommended by the Commissioner of Customs; (2) no adjustments in the "foreign market value" derived from the formula would be allowed; (3) after these liquidations, the Customs Service would review the expected protests in order to determine (a) the legal validity of the Commodity Tax approaeh, and (b) whether any adjustments for differences in circumstances of sale (other than those already incorporated into the formula) should be made to the foreign market value as determined by means of the Commodity Tax formula (see Chasen Aff. para 38; Mundheim Aff. paras. 6, 22). On March 31, 1978, numerous entries were liquidated and a total of $46 million in dumping duties was

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[6]There are two methods for calculating the Japanese Commodity Tax. Manufacturers may report the actual factory wholesale price of their television receivers, or apply a formula to the retail price in order to work backward to the factory wholesale price (Administrative Record, Document B at 5). The Commissioner proposed to utilize the second method of computing the tax, so that the "foreign market value" could be calculated by means of published Japanese retail price information (Administrative Record, Document RR).

[7]The Commissioner proposed to utilize invoice prices despite evidence that some purchase prices were actually lower than those reported to the Customs Service, due to concealed rebates (Administrative Record, Document B at 27). The decision to use invoice prices rather than "true" prices (reported prices less the rebates) was made to avoid jeopardizing pending criminal investigations into the rebate scheme.

imposed (Chasen Aff. para. 36). Subsequently, in December 1978 and June 1979, additional entries were liquidated and assessed, with dumping duties totaling approximately $32 million (see *id.* at para. 52).

Several importers paid the duties assessed as a result of the March 31, 1978, liquidations, but 699 protests were also filed (Mundheim Aff. para. 26). During the course of its review of these protests, the Customs Service determined that many of the protests would be granted in part (largely due to allowance of additional claimed adjustments to the "foreign market value" as determined by means of the Commodity Tax formula). The Commissioner therefore offered to defer collection efforts in return for the payment of a portion of the duties and the tender of an interest bearing promissory note for the remainder of the duties ultimately found to be due after action on the protests (Chasen Aff. paras. 39-50). Recalcitrant importers who did not accept this offer were referred to the Department of Justice, which instituted suit against them and their sureties.[8]

In January 1980, the President transferred responsibility for administration of the antidumping laws from the Department of the Treasury to the Department of Commerce. Exec. Order No. 12188, 45 Fed. Reg. 989 (1980);

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[8]During this period, Ambassador Strauss, Special Trade Representative, entered into an Orderly Marketing Agreement with the government of Japan that regulated the number of Japanese television receivers exported to this country. The United States interpreted this agreement as requiring an expeditious resolution of the problem caused by the backlog of unliquidated entries subject to T.D. 71-76. The agreement, however, was never viewed as, and never had the effect of, requiring any action inconsistent with the federal antidumping statute. See *Administration of the Antidumping Act, 1921, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 259, 262 (1978).

Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979). The General Counsel of the Commerce Department reviewed the history of the administration of T.D. 71-76 and consulted with the Commissioner of Customs and a number of other agencies concerning the matter (Moyer Decl. paras. 4-10). He was informed that the protests filed to the March 31, 1978, liquidations, if successful, would reduce the duties assessed from $46 million to approximately $8 million (*id.* at attachment A, p. 4). He was also informed that, based upon the experience gained from reviewing the protests, the maximum amount that could be claimed utilizing the Commodity Tax formula for entries through March 31, 1979, was $138.7 million (*id.* at para. 8). Finally, the General Counsel was informed, and concluded himself, that there was some doubt that the courts would sustain the use of the Commodity Tax formula as a means of determining "foreign market value" (*id.* at para. 9).[9]

Accordingly, the General Counsel of the Commerce Department began exploring the possibility of settling with various importers. He first determined what proportion of the maximum $138.7 million in duties that could be assessed pursuant to the Commodity Tax formula would be attributable to each importer (Moyer Decl. para. 12). For each importer, he then analyzed a number of factors relating to litigation risks and other considerations appropriate to reaching reasonable settlement amounts (*ibid.*). Finally, after considering the appropriateness of the total settlement amount, the General Counsel reached a non-negotiable settlement figure for each importer (*ibid.*).

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[9]In addition, the General Counsel realized that, given the enormous amount of data involved, the administrative difficulties inherent in the calculation and assessment process, and the certainty of widespread litigation, it could take years for the government to collect the duties assessed pursuant to the Commodity Tax formula (Moyer Decl. at Attachment A).

On April 28, 1980, the General Counsel recommended that the Secretary of Commerce settle all claims for dumping duties on Japanese televisions imported through March 31, 1979 (Moyer Decl. para. 14). The Secretary approved the recommendation and the General Counsel proceeded to implement that decision (*ibid.*). The agreements ultimately reached provided, *inter alia*, that (Administrative Record, Documents G through BB): (1) the importers would remit payments to the government totaling $77 million; (2) in return for these payments, the responsible agencies of the United States would (a) dismiss with prejudice the suits for the collection of duties assessed upon entries made prior to July 1, 1973, (b) abandon certain further administrative investigations concerning the possible imposition of civil penalties pursuant to 19 U.S.C. (Supp. IV) 1592, (c) issue instructions within 10 days to Customs officers to liquidate entries made prior to March 31, 1979; (3) the importers would abandon their right to challenge in the Customs Court the assessment of duties made prior to March 31, 1979; and (4) T.D. 71-76 would remain in effect and would be administered for entries after March 31, 1979, in accordance with the new antidumping amendments to the Tariff Act of 1930, as added by the Trade Agreements Act of 1979.

The portion of the agreements relating to claims for dumping duties and alleged violations of 19 U.S.C. (Supp. IV) 1592 were executed on behalf of the government by the Departments of Commerce and the Treasury pursuant to 19 U.S.C. 1617.[10] See Exec. Order No. 12188, *supra*;

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[10]Section 1617 provides:

> Upon a report by a customs officer, United States Attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

Reorg. Plan No. 3, *supra*. The agreements dismissing the collection suits were executed by the Department of Justice pursuant to 28 U.S.C. 516, 519.

2. Petitioner challenged the settlement agreements in the Court of International Trade (CIT) (formerly the Customs Court) on two grounds (Pet. App. 47a-62a). First, petitioner alleged that the settlements were *ultra vires*, beyond the authority vested in the Commerce and Treasury Departments by 19 U.S.C. 1617, and in violation of congressional will as expressed in the Trade Agreements Act of 1979, 19 U.S.C. (Supp. IV) 1516a and 1675. Second, petitioner alleged that even if the agreements were authorized by Section 1617, they should be set aside because they were negotiated in bad faith. Review was sought under Section 516A(a)(2) of the Trade Agreements Act (19 U.S.C. (Supp. IV) 1516a(a)(2)), and the Administrative Procedure Act (5 U.S.C. 702 *et seq.*). Jurisdiction was based on 28 U.S.C. (Supp. IV) 1581(c) and (i).

On February 27, 1981, the CIT granted the government's motion for summary judgment with regard to Count I (Pet. App. 99a-109a). The court found that the language of Section 1617 clearly authorized the compromise of "any claim arising under the customs laws" (19 U.S.C. 1617; Pet. App. 104a). The court rejected a restrictive construction of Section 1617, propounded by petitioner, that would have limited the statute solely to compromises of liquidated claims. Petitioner based this restrictive reading of Section 1617 on a similarly limited reading of an earlier statute, Rev. Stat. 3469 (1878 ed.) (Act of Mar. 3, 1863, ch. 76, Section 10, 12 Stat. 740). The court, however, found no basis for limiting either Section 1617 or Rev. Stat. 3469 to compromises of liquidated claims. Rather, in the absence of any legislative history to the contrary, the court held that the plain language of Section 1617, which authorized compromise of "any claim," was controlling (Pet. App. 102a-105a).

The court also rejected petitioner's argument that the Trade Agreements Act implicitly modified the compromise authority granted by Section 1617. The court found nothing in the legislative history of the Trade Agreements Act to suggest modification of the compromise power, noting that repeals by implication are not favored (Pet. App. 105a-106a). Nor did the court find any repugnancy between the two provisions (*id.* at 106a-108a; footnote omitted):

> No * * * repugnancy exists here since the two provisions reflect different Congressional concerns and apply to different functions of the Secretary. The purpose of section [1617] is to provide the Secretary with the authority to settle claims for duties and to outline the procedures to be followed and the factors to be weighed in the course of determining whether a given claim for duties should be settled.
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> The purpose of section 751 [of the Tariff Act, added by the Trade Agreements Act] is entirely different. That section provides in part that where there has been a finding of dumping, the Secretary shall review and determine the amount of antidumping duty to be assessed by determining the difference between the foreign market value and United States price of the imported merchandise. Upon the request of an interested party, the Secretary must hold a hearing regarding his review and determination of antidumping duties. These procedures are designed to facilitate the speedy assessment of antidumping duties and to provide designated parties a greater role in these determinations. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979); S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979). It is to be added that these determinations are subject to judicial review under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a).

The court concluded (*id.* at 108a):

> In sum, section [1617] and section 751 are separate and distinct statutes. Nothing in the terms or the legislative history of section 751 in any way refers or relates to, much less derogates from, the Secretary's authority under section [1617]. Clearly, had Congress intended that the authority contained in section [1617] be modified in any way by the Trade Agreements Act of 1979, it would have so stated. Given these facts, the court cannot agree with plaintiff's contention to the effect that Congress impliedly limited the scope of section [1617] when it enacted section 751 into law.

The court therefore granted summary judgment to the government on Count 1. The court, however, denied summary judgment as to Count 2, based on an earlier conclusion that petitioner had made a "sufficient" showing of bad faith (Pet. App. 101a n.5, 109a; 92a-93a).

With the case proceeding on Count 2, petitioner moved to compel production by the United States of certain documents, including the investigative file compiled by the Customs Service on television importations by respondent Montgomery Ward & Co., Inc. (Wards). Wards was permitted to intervene for the sole purpose of opposing the motion for production of that file. On May 13, 1981, the CIT granted petitioner's motion for production of the file under a protective order (Pet. App. 21a). Following denial of rehearing, Wards appealed to the Court of Customs and Patent Appeals (CCPA), where the United States was granted leave to intervene as an appellant (*id.* at 1a).

3. The CCPA held that it had jurisdiction over the appeal (Pet. App. 8a-9a) and then considered the question whether the CIT could properly review the settlements.[11] Initially, the court rejected petitioner's assertion that the government had no statutory authority to settle the antidumping claims at issue here. The CCPA, like the CIT, concluded that 19 U.S.C. 1617 provided ample authority "for settlement of antidumping proceedings" (Pet. App. 9a-10a).

Next, the court considered the claimed bases for review under petitioner's "bad faith" theory. Review could not be had under 19 U.S.C. (Supp. IV) 1516a, the CCPA held, because that section only provides for judicial review of administrative "determinations" made pursuant to the Trade Agreements Act, not of settlements made pursuant to Section 1617. "A settlement agreement is not an administrative review of an antidumping order resulting in a 'determination' * * *." (Pet. App. 11a).

The court also rejected petitioner's contention that the substantive and procedural requirements of the Trade Agreements Act could be superimposed upon a settlement authorized by Section 1617. Petitioner "does not dispute that the procedures set out in 19 U.S.C. 1617 were followed but [instead] asks the court to find that the procedures of 19 U.S.C. 1675 are superimposed [upon section 1617], thus

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[11]Petitioner contends (Pet. 9) that the issues decided by the CCPA were not briefed. However, both the United States and Wards challenged the district court's authority to allow discovery on petitioner's second cause of action. Petitioner replied (Brief for Appellee 16): "[T]he question of whether appellee should have been allowed to conduct discovery is not collateral to but central to appellee's litigation against the Government. The invitation to this Court by Wards (and the Government) to reach this broad issue should be declined." Moreover, the issues were later fully briefed in support of and in opposition to the petition for rehearing.

giving [petitioner] a right to a hearing which it says would encompass the terms of settlement" (Pet. App. 16a, footnote omitted). However, the CCPA remarked that "[w]e see no reasonable basis for placing such a limitation on the Secretary's authority under [Section 1617] and conclude there is none" (*ibid.*). Thus, the court held, petitioner's challenge to the settlements must be directed solely to Section 1617, and under that statute petitioner "was not entitled to a hearing or to be consulted regarding the considerations entering into the terms accepted by the Secretary in settlement of these claims" (*ibid.*).

Finally, the court rejected petitioner's invitation to "look behind the apparent regularity of the procedures into the motives for settlement" (Pet. App. 17a). Relying on *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941), the court held that petitioner could not "inquire into the merits of the settlement or into the Secretary's mental processes * * *" (Pet. App. 18a). Petitioner's discovery request, however, bore out the fact that such prohibited probing "is [petitioner's] objective" (*id.* at 18a-19a; footnotes omitted):

> The request for the Wards file bears on what figures the Secretary may have considered in arriving at settlement. Proving that the estimate in the report to him was lower than what Zenith considers reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar amount of the Government claims. The settlement agreement required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring

> cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations and, in any event, these are not matters for which the court may demand answers.

In conclusion, the court explained why the settlement agreements at issue here are singularly inappropriate for judicial review (Pet. App. 19a-20a, footnote omitted):

> To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made. Nor is it appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors. The decision to settle under attack here was required to be and was the personal decision of the Secretary. * * * Zenith includes in its complaint no more than perfunctory allegations of impropriety in the actions by the Secretary and his advisors.
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> * * * * *
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> The Zenith complaint is manifestly not directed to correction of procedural irregularity. It does not seek to have the settlement set aside until the requirements of 19 U.S.C. 1617 are properly met. Rather it seeks through the power of the court to prevent settlement.

ARGUMENT

The decision of the Court of Customs and Patent Appeals is correct and does not conflict with the ruling of any other court.[12] Petitioner's unsupported contentions do not warrant review by this Court.

1. Petitioner first contends (Pet. 11) that the Trade Agreements Act of 1979 modified the authority granted to the Executive Branch by 19 U.S.C. 1617 to compromise "any claim arising under the customs laws." Petitioner cites absolutely no authoritative support for its position, however, relying instead (Pet. 12 n.15) on the legislative history and administrative interpretations of another statute, Rev. Stat. 3469 (1878 ed.), the relevance of which was expressly rejected by the CIT (Pet. App. 102a-105a) and implicitly rejected by the CCPA (*id.* at 9a-10a).[13]

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[12] *Local 1219, American Federation of Government Employees* v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982), cited by amicus curiae COMPACT (Amicus Br. 9), does not conflict with the decision below. First, the rights compromised by the government in that case were those of the union members to a fair election. Here, the government is compromising its own rights. Second, without conceding that *Local 1219* was correctly decided, we note that the regulation authorizing settlement in that case required that a settlement provide "appropriate remedial action" (slip op. 8), an arguably substantive standard. In the instant case, 19 U.S.C. 1617 provides no substantive standard for review of a compromise effected under its terms. Therefore, while there may have been substantive law to apply in *Local 1219*, there is none here.

[13] Petitioner also relies upon a letter written by a single Member of Congress to an official of the Commerce Department, concerning the Trade Agreements Act of 1979 (Pet. 11 n.14). This letter, however, which was written after the Trade Agreements Act was enacted and which does not even purport to reflect opinions expressed in the course of congressional debate, cannot justify a holding that the authority contained in Section 1617 was repealed by implication. See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

The Trade Agreements Act itself does not refer at all to the compromise authority contained in Section 1617, and nothing in its legislative history indicates a congressional intent to affect that authority. As the CIT correctly held, since Section 1617 and the Trade Agreements Act "reflect different Congressional concerns and apply to different functions of the Secretary" (Pet. App. 106a), the two are easily reconciled and both may be given full effect. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). It would "surely do violence to the 'cardinal rule * * * that repeals by implication are not favored' ", *TVA* v. *Hill*, 437 U.S. 153, 189 (1978), to hold, as petitioner asserts, that the Trade Agreements Act of 1979 implicitly repealed the authority contained in Section 1617 insofar as it pertains to claims for dumping duties.

Petitioner's argument, at bottom, amounts to nothing more than a wistful assertion that Congress logically could not have intended the Executive Branch to shortcut the procedures created by the Trade Agreements Act by settling dumping claims under Section 1617. But that is like arguing that the United States may not settle civil cases or accept plea bargains in criminal cases, because by so doing it would be shortcutting the rules of civil and criminal procedure. The courts below correctly held that Congress intended the administrative and compromise processes to exist side by side, the former to be used when compromises either are not possible or are not considered in the interest of the United States, the latter to be used when they are.[14]

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[14]The law, of course, favors the resolution of disputes without litigation. Accordingly, courts have denied standing to those who are not parties to compromise agreements who nevertheless wish to challenge the validity of the agreements. See, *e.g.*, *In re Equity Funding Corp. of America Securities Litigation*, 603 F. 2d 1353, 1360-1361 (9th Cir. 1979); *Smith* v. *South Side Loan Co.*, 567 F. 2d 306, 307 (5th Cir. 1978). The agreements here compromised differences between the

2. Petitioner next argues that the court below erred in holding that the Secretary's compromise of anti-dumping duty claims under 19 U.S.C. 1617 is not subject to judicial review (Pet. 12). This contention is also without merit. Section 1617 is entirely devoid of standards to govern the discretionary exercise of the compromise authority conferred upon the Secretary by the statute. Here, as in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-456 (1979), "on the face of the statute there is simply 'no law to apply' in determining if the decision [of the Secretary] is correct." Moreover, the legislative history of 19 U.S.C. 1617 is completely silent on the question of what standards the Secretary is to utilize in exercising the authority the statute confers upon him. Given this absence of substantive standards in either the statute itself or its legislative history, the court below correctly held, in accordance with a number of analogous decisions, that an exercise of the compromise authority contained in Section 1617 is not subject to judicial review. See, *e.g.*, *District of Columbia* v. *Schramm*, 631 F. 2d 854, 860-861 (D.C. Cir. 1980); *Greater New York Hospital Association* v. *Mathews*, 536 F. 2d 494, 497-498 (2d Cir. 1976).

Petitioner does not contend that 19 U.S.C. 1617 or its legislative history contains standards to govern the Secretary's discretionary settlement authority. Rather, petitioner contends (Pet. 13) that the court below erred because judicial review may be permissible, even in those cases where

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government and various importers and thus obviated the need to resolve those differences through litigation. Petitioner and the amici are strangers to these agreements and do not possess an interest in the duties assessed upon the importers. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914). Thus, petitioner's standing to attack the settlements at issue in this case is far from certain.

there are no applicable statutory standards, if the agency has abdicated its responsibilities or has acted beyond the bounds of or in clear defiance of its authority.

Even assuming, *arguendo*, that petitioner has correctly stated the law, the court below properly concluded that the Secretary's exercise of discretion in this case is not subject to judicial review. Petitioner has not shown that the Secretary failed to comply with the procedures specified in Section 1617.[15] Instead, petitioner contends (Pet. 13) that "the Secretary of Commerce and his advisors have been in clear defiance of the congressional will and have rested on 'considerations that Congress could not have intended to make relevant.' " The CCPA, however, thoroughly examined petitioner's allegations of "bad faith" and "defiance of the congressional will," including those advanced in this Court, and found that they were "no more than perfunctory" (Pet. App. 19a) and "conclusory" (*id.* at 19a-20a n.17).[16] The court therefore correctly held that judicial review was foreclosed. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971) (plaintiffs must make a "strong showing of bad faith or improper behavior" before being

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[15]The record is clear that the compromises were effected upon the recommendation of the Secretary's General Counsel (19 U.S.C. 1617; Exec. Order No. 12188, 45 Fed. Reg. 989 (1980); Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979)).

[16]The example of "bad faith" presented by petitioner (Pet. 15-16) is wholly irrelevant to this case. The quoted memorandum was drafted by Special Assistant to the General Counsel Jordan Luke of the Treasury Department in connection with unsuccessful settlement negotiations conducted in 1978. The memorandum did not express an official position (see Luke Deposition, pp. 446-447, Ex. G, U.S. Opposition to Rehearing in CCPA) and was not considered by the Commerce Department when it concluded the 1980 settlements at issue in this case (see Moyer Deposition, pp. 244-245, 651-653, 659; Hume Deposition, pp. 483-489, 607-608, 611; Barden Deposition, pp. 272-274, 274-278, Exhs. D, E and F, U.S. Opposition to Rehearing in CCPA).

permitted to seek explanations for agency action beyond those contained in formal administrative findings). Further review of this factual determination made by the Court of Customs and Patent Appeals is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

DOJ-1982-09